No. 22544

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OPENING BRIEF OF PETITIONER.

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Jurisdictional Statement.

This case is before this court by way of a petition praying that a decision and order of the National Labor Relations Board, herein called the "Board" (reported at 168 NLRB No. 112) be reviewed and set aside in its entirety, and that the court direct the Board to adopt the recommended decision of the Trial Examiner and to take such further proceedings as are appropriate under the National Labor Relations Act as amended, herein called the "Act," [61 Stat. 136 *et seq.* (1947), 29 U.S.C. §141 *et seq.* (1958)]. Petitioner is engaged in, and transacts business in, the State of California, as does the respondent labor Union and the alleged unfair labor practices occurred in the State of California, in the Central District of the United States District Court. This court, therefore, has jurisdiction of this petition by virtue of Section 10(f) of the Act as amended.

I.

STATEMENT OF THE CASE.

A. History of the Case.

As a result of charges filed by petitioner in Case Nos. 31-CC-80 and 31-CC-89 on June 23 and August 29, 1966, and an investigation by the General Counsel of the Board sustaining such charges, on October 27, 1966, the General Counsel issued an order consolidating said cases and the consolidated complaint and notice of hearing herein. The charges [Tr. Vol. I, pp. 3, 9, 10, 11] and the consolidated complaint [Tr. Vol. I, p. 12] charge the International Union of Operating Engineers, Local Union No. 12, AFL-CIO, herein called the "Union" with unlawful threats, coercion and restraint of certain "self-employed independent owner-operators, and other persons engaged in commerce or in an industry effecting commerce."

Specifically, the Union was charged with engaging in a plan, program and campaign to force or require self-employed independent owner-operators in the Southern California area, including Vance and Watson, to join the Union and to force employers in the building and construction industry in the Southern California area to cease doing business with self-employed owner-operators in said area, including Vance and Watson, all in violation of Section 8(b)(4)(ii)(A) and (B) of the Act.

The hearing before the Trial Examiner was held on February 16 and 17, 1967. Virtually no attempt was made thereat to present evidence in rebuttal to clear evidence of unlawful conduct, the Union raising but a single issue of substance, that of whether the owner-operators, Vance and Watson, were in fact independent contractors or employees. On April 21, 1967, Trial Exam-

iner, E. Don Wilson, sustained all charges against the Union. On December 12, 1967, the Board affirmed all of the Trial Examiner's findings and conclusions except for those relating to the alleged independent contractor status of the owner-operators. On this issue, the Board reversed the Trial Examiner finding that the Union

> "was involved in disputes with the employer relating *to their employees,* and was not, therefore, in violation of Section 8(b)(4)(ii)(A) and (B) of the Act. Accordingly, we shall dismiss the complaint." (Emphasis supplied).

B. The Independent Contractor Status of Vance and Watson.

The Trial Examiner framed the independent contractor issue in the following words:

> "(1) Were Samuel J. Vance and John Watson self-employed persons within the meaning of the Act?" [Tr. Vol. I, p. 31, line 5.]

The findings of the Trial Examiner pertinent to this issue are copied here in full, in view of their importance, and in view of the fact that the Board accepted the Trial Examiner's findings of fact, quarrelling only with his "interpretation of the facts as to control over the means utilized or his failure to take into account the nature of the work involved." [Tr. Vol. I, p. 44, line 17.]

> "B. The facts with respect to the self-employment status of Vance.
>
> "I find that at material times, Vance was a self-employed person.[3] He was in the business of ex-

"3. Disputes with self-employed contractors are as primary in character as if the self employed contractor had others doing the work for him. *Northwestern Construction of Washington, Inc.,* 152 NLRB 975, 980.

cavating and grading, using a skip loader and dump truck in his operations. He owns the skip loader and tractor and when necessary, rents the dump truck by the hour. He pays his own costs, thus, he pays for needed insurance, fuel, repairs, and services on his own equipment and pays for the rental of the dump truck and the fuel therefor, when he uses it. He either solicits work for himself or through the services of a company known as El Monte Equipment Co. He pays El Monte 10% of his earnings for El Monte's services in doing his bookkeeping, providing telephone service, advertising, and parking his equipment. Vance's customers are billed by El Monte and upon payment, El Monte deducts 10% for itself and remits the balance to Vance. During the last year, Vance worked for about 100 customers, including contractors and home owners. He charges and is paid by the hour. No deductions for social security or income tax are made from his compensation. During material times, Vance obtained an excavating and grading job with Webb and Lipow at the C. L. Peck Wilshire Plaza Construction Project. Webb and Lipow was performing the shoring operations on the Project pursuant to a contract with Peck. The shoring required the digging of holes by drills. Vance was retained to use his skip loader and take the dirt away from the holes and to spread it. The only directions he received were on his first day when he was told to keep ahead of the drills and spread the dirt.

"C. The facts with respect to the self-employment status of Watson.

"Watson does grading work. He uses a truck, trailer and skip loader. He owns all of his equipment. He pays the insurance on his equipment. In the past year he has worked for about 75 different persons through self solicitation and job referrals from contractors and friends in the excavating business. Prospective customers reach him through his own phone where he has a telephone answering service for which he pays. While he works principally for contractors he also works for private home owners. He has no employees but is paid for his services and the use of his equipment. Social security or income tax is never deducted from the compensation he receives from customers. He works by the hour for a fee which he sets and changes on occasion. He keeps his own record of the hours he works.[4] Swinerton & Wal-

"4. It must be noted that Respondent considered Watson a self employed person since it required him to sign a collective bargaining agreement with Respondent.

berg Co., Oltmans and Jackson used Watson's services separately and from time to time, to do finished grading work for cement or concrete. A superintendent from each company told him where he was to work and that he was to grade from grade stakes. He first started work on this project through a referral from an excavator.

"D. Conclusions as to the self employment and person status of Vance and Watson.

"I find the facts establish Vance and Watson as independent contractors, or self employed persons. Respondent contends they are employees. The 'right of control' test governs. It is recognized that no one factor is determinative of this issue. The persons for whom Vance and Watson performed work had the right of control only over the end to be achieved and not over the means to be used in reaching such end. Vance and Watson were independent contractors in law and as a matter of economic reality. They were persons and self employed persons. They determined their own profits by what they paid for, or the rate at which they rented, their equipment; they set their own rates of pay; they determined what repairs and services they needed and arranged for the same to be done; they determined what insurance they needed and paid for the same. They were told what they should do but it was substantially left to them as to how they should achieve the ends. They assumed the risks of their businesses. They were to accomplish results or to use care and skill in accomplishing results. The control exercised by the contractors with respect to Vance and Watson was limited to the achievements of a desired result and did not include control of the means. They were self employed persons within the meaning of the Act. I consider it irrelevant that neither possessed a license as a contractor." [Tr. Vol. I, p. 31, line 16.]

II.

SPECIFICATION OF ERRORS RELIED UPON.

The Board erred in the following respects:

1. The Board erred in concluding that Vance and Watson were employees and not independent contractors.

2. The Board erred in concluding that the crucial factor in determining the status of Vance and Watson was the degree of control reserved over the means of performing their work and not the degree of control exercised.

3. The Board erred in concluding that the simple description of the job assignment given Vance and Watson *limited* the manner and means to be used to accomplish the job.

4. The Board erred in finding that Vance and Watson were engaged to perform duties that could have been assigned to acknowledged employees of the contractors.

5. The Board erred in finding that, in the context of the work to be performed, the supervision exercised over Vance and Watson was no less than would be exercised over acknowledged employees of the contractors.

6. The Board erred in finding that the degree of control exercised over Vance and Watson evidenced an employment relationship because of the recurrent dependence of Vance and Watson upon the contractors for future employment.

7. The Board erred in concluding that the respondent union was engaged in disputes with employers regarding employees and that, therefore, the respondent

union's acts did not violate Section 8(b)(4)(ii)(A) and (B) of the National Labor Relations Act.

8. The Board erred in dismissing the complaint of its General Counsel and in not adopting the decision of its Trial Examiner.

III.

SUMMARY OF ARGUMENT.

The position taken by the petitioner in its charges, by the General Counsel of the Board in issuing complaint, and by the Trial Examiner in finding violations of the Act, *i.e.*, that the owner-operators were independent contractors and not employees, is correct.

IV.

ARGUMENT.

A. Vance and Watson Were Independent Contractors and Not Employees.

The Board finding of employee status stems in part from its erroneous statement of the law that "the crucial factor is the degree of control reserved over the means, not the degree of control exercised," [Tr. Vol. I, p. 44, line 22], whereas the control exercised in fact is of vital importance in determining independent contractor status, and especially is this true when, as here, there is no written contract.

The only case cited by the Board in support of its decision, *i.e.*, *Marshall and Haas*, 133 NLRB 1144, establishes not a "right of control," but an "exercise of control" test. In *Marshall and Haas* the contractor hired six drivers, four of whom were admitted employees and two of whom were alleged independent contractors.

However,

> "each [of the six drivers] was required to load his truck in succession at the Yuma plant and drive the mixer to the batch operation at the construction site. There each unloaded in turn and returned to the Yuma plant for reloading. At all times [all six drivers] were subject to the direction and control of one of the Pittmans, one of whom was the owner of Yuma. It was necessary, according to Howard Pittman, that the unloading of the concrete be a continuous operation and six trucks were required for this purpose. It was also necessary, therefore, that the drivers operate in tandem formation and maintain this steady pattern of unloading." (133 N.L.R.B. at 1145)

Despite this circumstance of direct exercise of control in the *Marshall and Haas* case, one Board member dissented from the independent contractor finding in that case, and the majority of two agreed that "the issue [was] close." (133 NLRB 1144, 1146.)

In the case of *NLRB v. Servett, Inc.,* 313 F. 2d 67 (C.A. 9, 1962), this Court refused to enforce a Board order holding that franchised driver-salesmen (who prior to the franchise plan were employees of the company and continued to do the same work) continued in employee status. It should be noted at this point that the Board decision in *Servett* was handed down on September 14, 1961, whereas its decision in *Marshall and Haas, supra* issued *just one month thereafter.* Yet, the Board in the instant case refers only to its decision in *Marshall and Hass* and quite ignores *Servett,* which was denied enforcement by this Court on the independ-

ent contractor issue, and which is much closer to the instant case factually.

The Board decision in *Servett* appears at 133 NLRB 132 (48 LRRM 1596). In *Servett* there was a history of admitted employees status (absent here), a permanence of relationship (absent here), the franchised work was done by the drivers themselves, not by drivers' employees (our factual situation is the same), and a franchise contract which provided for close control over the franchise operation, including for example the employer's right to replace a driver-nominated substitute (absent here).

It is clear that a finding of independent contractor status cannot rest on strict "right of control" as distinguished from control exercised in fact. Indeed, the right of control in *Servett* was clearly expressed in written franchise agreements, whereas here it is not so expressed, but only inferred by the Board solely from the nature of the operation.

The Board here, in effect, states that there simply cannot be an effective independent contractor arrangement because of "the nature of the work [here] involved." This is clear from the following language of the Board decision:

> "When they were hired, both Vance and Watson received their initial instructions from the project superintendent indicating the jobs to be accomplished. *However, the simple descriptions of the job assignment limited the manner and means to be used to accomplish the job.* For example, Watson was instructed to grade a certain area, the boundaries and level of which were marked by stakes. Vance's work, removing and spreading the

> dirt resulting from a drilling operation, was similarly limited by the instructions he received the first day on the job." [Tr. Vol. I, p. 44, line 25. Emphasis supplied.]

We challenge that there is any type of work or operation absolutely anathema to an independent contractor relationship which is otherwise proper. (Obviously, the Board, in writing the quoted paragraph, had fresh in mind the *Marshall and Haas* case), cited immediately thereafter, where six truck drivers, only two of whom were alleged independent contractors, operated in tandem and under the immediate direction of company supervisors.

The Board next finds that both Vance and Watson were "engaged to perform duties that could have been assigned to acknowledged employees of the contractors." The finding is clearly in error, for the contracts with Vance and Watson provided for varying rates, in each case set by Vance and Watson, from $11.00 to $15.00 per hour for the driver, the tractor, the skip-loader, and other necessary equipment as a package. [Tr. Vol. II, pp. 46, 95.] The record is entirely silent with respect to the availability to, or company ownership of, tractors and skip-loaders which might have been used by employees of the company in the operations involved. The functions in question could not have been assigned to employees. As has already been noted, the driver-salesmen in *Servett* had held employee status for many years prior to the establishment of the franchise agreement with said drivers; thus even were the work in question subject to assignment to employees, such a circumstance would not have been decisive.

The Board next holds that

> "in the context of the work to be performed, the supervision exercised over Vance and Watson would appear to be no less than would be exercised over acknowledged employees of the various contractors."

Again, the finding is in error, since it says in effect that there exists a flat rule of law which prohibits the sub-contracting of work of this character. Since this case does not involve written contracts (as in *Servett*, where the Board was able to point to specific items of control *expressly reserved to the employer*, and since there is no direct evidence here of exercise of control in fact), the Board was forced to justify its finding of employee status on the preliminary finding in effect that "there cannot be effective independent contractor status in work of this nature," a proposition obviously unsound.

Next, the Board makes the remarkable observation that

> "the degree of control exercised over the means of operation of Vance and Watson is further evidenced *by their recurrent dependence upon the contractors for future employment* on these and other construction jobs, and the fact that the manner in which they perform will be determinative of future assignments from these contractors."

Such a contention is not only factually unfounded, but is legally ridiculous. The contention is factually unfounded for the reason that the Vance principal in question was one of about one hundred for whom Vance had worked in the past year, and the Watson principal in question was one of approximately seventy-five for

whom Watson had worked in the past year.* [Tr. Vol. II, pp. 44, 62.] As much as 40% of Vance's business was for private home owners or plumbers, outside of the construction industry. Thus, Vance and Watson depended on repeat business only in the sense that any independent contractor so depends, and they were not, as the Board implies, under the implied threat of immediate discharge if they did not behave themselves.

But the conclusion of the Board that "recurrent dependence upon the contractors for future employment" is in any sense evidence of control is outrageous. The efforts of General Motors or General Electric to please their customers are no less nor greater than those of Vance or Watson to please theirs. Yet, General Motors does not become an employee of a customer because he has purchased or may purchase a second or third successive Oldsmobile. This contention of the Board falls heavily of its own weight, and serves to establish the proposition that by its exacting standards there is no independent contracting arrangement in a case of this kind which the Board will recognize as valid.

The Board finding that "Vance and Watson were hourly paid" is not correct in its implication that they worked for wages. The hourly rate referred to (from $11.00 to $15.00) covered driver and specified equipment, and was in no sense a wage. This fact becomes especially clear when we note, in the case of Vance, his ownership of the skip-loader and tractor, his rental of a dump truck when necessary, his payment of all of his own costs including insurance, fuel, repairs, services, parking space, office expenses and cost of

*Indeed Watson worked for three different principals on the dates in question, on occasion for all three on the same day. [Tr. Vol. II, pp. 64, 93.]

soliciting business, including telephone service, and advertising. Thus, what is left from a $15.00 hourly charge for Vance's services and equipment, *i.e.,* his profit, is not a set part thereof, but varied considerably, depending upon Vance's total business during the month involved, and the allocation of the costs to accounts of the dozen or more customers served in the period involved.

B. Vance and Watson Satisfy All of the Commonly Accepted Court Tests for Independent Contractors.

The factual findings of the Trial Examiner, adopted by the Board, establish that in every respect Vance and Watson on the one hand, and the dozens of companies and individuals they dealt with on the other *i.e.,* the principals each behaved as responsible contracting parties. Thus both Vance and Watson were members of appellant Associated Independent Owner-Operators, Inc., an employer association. When faced with collection problems they would proceed in court rather than by way of wage claims before the Labor Commissioner. Their rates were set by themselves (and differed between Vance and Watson) and not by the principal. [Tr. Vol. II, pp. 96, 95, 59.]

The record in this case is absolutely devoid of any evidence either of control reserved or control exercised in fact by the contractor. Yet, even in cases where there is evidence of a certain amount of control, *the courts have repeatedly held that an employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms without thereby converting such independent contractor into an employee.*

Casement v. Brown, 148 U.S. 615, 622, 13 S. Ct. 672, 37 L. Ed. 582;

NLRB v. Steinberg (C.A. 5, 1950), 182 F. 2d 850.

The case of *Illinois Tri-Seal Products v. United States,* 353 F. 2d 216, 230 (U.S. Court of Claims, 1965) specifies an additional reason for finding independent contractor status in that "the parties believed that they were creating a principal-independent contractor relationship and not an employer-employee relationship."

The belief that an effective principal-independent contractor relationship had been created here was shared by both parties, a fact demonstrated dramatically at the hearing in examination of Vance in the following exchange:

> "Q. (On cross-examination, by respondent) Have you ever had to bring a legal action—that is, to collect money that is due you? A. Once.
>
> Q. Did you bring that with the Labor Commissioner? A. No.
>
> Q. How did you do that? A. Through the Glendale courts."

The significance of this testimony is that had Watson considered himself an employee, he would have proceeded with a wage claim through the California Labor Commissioner—where he would incur neither attorney expense or court costs. Since he considered himself an independent businessman, he proceeded with court action. [Tr. Vol. II, p. 96.]

The case of *Radio City Music Hall v. United States,* (C.A. 2, 1943), 135 F. 2d 715, contains the following language which has been quoted with approval in dozens

of subsequent Circuit Court decisions, relating to the extent of control which a principal may exercise over the work of an independent contractor without destroying that relationship:

> "The test lies in the degree to which the principal may intervene to control the details of the agent's performance. . . . In the case at bar, the [principal] did intervene to some degree; but so does a general building contractor intervene in the work of his sub-contractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. *Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees.*" (Emphasis added.)

The courts have repeatedly emphasized the minor reliance to be placed on precedents in determining independent contractor status, and the fact that every case must be determined upon its own facts. However, the following cases (*the first five of which involve Circuit Court refusals of enforcement of National Labor Relations Board orders denying independent contractor status*) are all strikingly similar to the instant case.

National Van Lines v. NLRB (C.A. 7, 1960), 273 F. 2d 402 (involving owner-drivers);

United Insurance Co. v. NLRB (C.A. 7, 1962), 304 F. 2d 86 (involving insurer debit agents);

NLRB v. Servett, Inc. (C.A. 9, 1962), 313 F. 2d 67 (involving driver-salesmen);

Site Oil Co. of Missouri v. NLRB (C.A. 8, 1963), 319 F. 2d 86 (involving gasoline station operators);

NLRB v. A. B. Abell Co. (C.A. 4, 1964), 327 F. 2d 1 (involving newspaper carriers);

Johnson v. Royal Indemnity Co. (C.A. 5, 1953), 206 F. 2d 521 (involving owner-drivers);

Illinois Tri-Seal Products (U.S. Court of Claims, 1965), 353 F. 2d 216.

A reading of the foregoing cases brings the conviction that the facts in the instant case are singularly devoid of circumstances pointing toward an employer-employee relationship.

V.

CONCLUSION.

The Board Erred in Dismissing the Complaint of its General Counsel and in Not Adopting the Decision of Its Trial Examiner.

The charges of petitioner herein were accepted by the General Counsel of the Board as having merit and in turn by the Trial Examiner as having been established at trial. The Board accepted the factual findings of the Trial Examiner in all respects, but dismissed the complaint based upon its disagreement with the Trial Examiner *as to the interpretation placed by him upon such facts*. Thus, the sole issue presented here is whether Vance and Watson were employees or independent contractors at the time of the unfair labor practices complained of; if independent contractors, the appropriate remedy is the setting aside of the decision and

order of the Board in its entirety, directing the Board to adopt the recommended decisions of the Trial Examiner and to take such further proceedings as are appropriate under the Act.

Dated: May 13, 1968.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME SMITH

APPENDIX A.

Pursuant to Rule 18(2)(f) of the Rules of this Court the following exhibits were identified, offered and received in evidence on the trial of this case.

General Counsel's Exhibits

Number	Identified	Offered	Received in Evidence
1(a) through 1(t)	6	6	6
2 and 3	25	neither offered nor received	
4	56	"	
5	68	"	
6	118	"	

Respondent Union's Exhibits

Number	Identified	Offered	Received in Evidence
1	30	30	34
2	146	157	157

APPENDIX B.

The relevant provisions of the National Labor Relations Act, as amended, (29 U.S.C. 151, *et seq.,* 61 Stat. 136, 73 Stat. 519) are as follows:

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"